

LAM KONG COMPANY LTD

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v.

THONG GUAN CO PTE LTD

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
MOHAMED DZAIDDIN FCJ
HAIDAR MOHD NOOR JCA
[CIVIL APPLICATION NO: 08-41-1998(W)]
29 MAY 2000

b

CIVIL PROCEDURE: *Appeal - Leave to Appeal - Refusal by Court of Appeal to grant leave - Whether refusal final - The “filter” principle*

c

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Preliminary objection - Appeal from decision of Court of Appeal under s. 68(1)(a) of Courts of Judicature Act 1964 - Whether appeal misconceived - Section 96(a) Court of Judicature Act 1964*

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The applicant had earlier filed an appeal to the Court of Appeal without leave in respect of a subject matter which was less than RM250,000. The Court of Appeal allowed respondent’s motion to strike out the appeal. The applicant now appeal to the Federal Court against that decision. The respondent raised the preliminary objection that the application was misconceived because it was founded on the decision of the Court of Appeal under s. 68(1)(a) of the Act and not from its judgment or order in respect of a civil cause or matter decided by the High Court in the exercise of its original jurisdiction within the meaning of s. 96(a) of the Act.

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Held:

Per Chong Siew Fai CJ (Sabah & Sarawak) (dissenting)

[1] The present case may be distinguished from *Auto Dunia* case because in *Auto Dunia* it was not disputed that leave to appeal to the Court of Appeal was necessary. Hence, what the Court of Appeal had to decide was whether to grant or to refuse leave. However, in the instant case, it was disputed as to whether leave to appeal to the Court of Appeal was necessary.

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[2] The decision of striking out or dismissal would be appealable for the issue here was not whether to grant or refuse leave to appeal (which would be non-appealable), but rather whether the deciding court was right in holding that leave to appeal was necessary.

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- a* [3] The words “*in respect of*” in s. 96(a) of the Courts of Judicature Act, 1964 means that there must be some connection or relation between the judgment or order of the Court of Appeal and the civil cause or matter decided by the High Court in the exercise of its original jurisdiction. In the instant case, there clearly was an undisputable connection or relation between the said order of the Court of Appeal and the decision of the trial judge in the High Court.
- b*

- c* [4] In law, where an objection to the jurisdiction of a lower court appears on the face of the proceedings, a party who consented to the exercise of the jurisdiction is not thereby estopped from subsequently raising the objection. This is because the jurisdiction of a court of limited jurisdiction cannot be enlarged by any form of estoppel.

- d* [5] Estoppel *in pais*, as a matter of law, arises when a person by his conduct or words makes a clear representation of fact either with knowledge of its falsehood or with the intention that it should be acted upon, and the other person has acted upon such representation and thereby altered his position to his prejudice. Here, the question of acting upon the representation to the prejudice of a party did not arise.

Per Mohamed Dzaiddin FCJ & Haidar Mohd Noor JCA (majority):

- e* [1] The legal authority to decide whether leave is required or not under s. 68(a) of the Courts of Judicature Act 1964 is the Court of Appeal and the decision of the Court of Appeal is final and not appealable. Otherwise, the “filter” principle would be defeated.
- f* [2] In the instant appeal, the application was founded on the judgment of the Court of Appeal in a pending appeal made on an application by the respondent to strike out the applicant’s notice of appeal for wanting of leave required under s. 68 of the 1964 Act.
- g* [3] Under s. 96(a) of the 1964 Act, the judgment or order of the Court of Appeal which is appealable to the Federal Court must be in respect of a cause of matter decided by the High Court on the merits and not in respect of interlocutory judgment or order decided by the Court of Appeal upon the hearing of an application made to it in a pending appeal before it.
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- i* [4] Upon striking out of applicant’s appeal in the Court of Appeal, the applicant’s rights were not exhausted or shut out or for that matter in any way prejudiced. Applicant should have resorted to r. 16 of the Rules of the Court of Appeal 1994 for an enlarged time to apply for leave.

[5] By filing the present application, the applicant attempted to circumvent r. 16 and it was an abuse of the process of the court if all remedies available under the law were not first exhausted.

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[Applicant's motion struck out with costs to the respondent.]

[Bahasa Malaysia Translation Of Headnotes]

b

Pemohon telah terdahulunya memfailkan satu rayuan ke Mahkamah Rayuan tanpa kebenaran berkait dengan satu halperkara yang jumlahnya kurang dari RM250,000. Mahkamah Rayuan membenarkan usul responden membatalkan rayuan tersebut. Pemohon kemudiannya merayu ke Mahkamah Persekutuan terhadap keputusan tersebut. Responden membangkitkan satu bantahan awal yang permohonan tersebut adalah satu kesilapan memandangkan ianya didasarkan pada keputusan Mahkamah Rayuan dibawah s. 68(1)(a) Akta Mahkamah Kehakiman 1964 dan bukannya dari penghakiman atau perintah yang berkait dengan satu kausa sivil atau perkara yang diputuskan oleh Mahkamah Tinggi dalam menggunakan bidangkuasanya yang asal dalam ertikata s. 96(a) Akta Mahkamah Kehakiman 1964.

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Diputuskan:

Oleh Chong Siew Fai HB (Sabah & Sarawak) (bertentangan)

[1] Kes semasa dapat dibezakan dari *Auto Dunia* kerana di dalam *Auto Dunia*, ianya tidak dipertikaikan yang kebenaran untuk merayu ke Mahkamah Rayuan adalah satu kemestian. Dari itu, apa yang Mahkamah Rayuan perlu putuskan ialah samada kebenaran dibenarkan atau tidak. Dalam kes semasa, kebenaran untuk merayu perlu atau tidak adalah dipersoalkan.

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[2] Keputusan membatalkan atau menolak dapat dirayu kerana isu disini bukanlah samada untuk membenarkan atau tidak kebenaran untuk merayu (yang mana ianya tidak dapat dirayu), tetapi samada mahkamah pemutus adalah betul dalam memutuskan bahawa kebenaran untuk merayu adalah satu kemestian.

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[3] Perkataan "*in respect of*" dalam s. 96(a) Akta Mahkamah Kehakiman 1964 bererti yang mesti terdapat pertalian atau hubungan di antara penghakiman atau perintah Mahkamah Rayuan dan kausa sivil atau perkara diputuskan oleh Mahkamah Tinggi di dalam menjalankan bidangkuasanya yang asal. Dalam kes semasa, jelas terdapat pertalian atau hubungan yang tidak dapat disangkal lagi diantara penghakiman atau perintah Mahkamah Rayuan dengan keputusan hakim bicara di Mahkamah Tinggi.

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- a* [4] Di dalam undang-undang, bilamana bantahan terhadap bidangkuasa mahkamah rendah dibangkitkan dalam prosiding, satu pihak yang bersetuju dengan penggunaan bidangkuasa tersebut tidak diestop dari kemudiannya membangkitkan bantahan tersebut. Ini adalah kerana bidangkuasa mahkamah yang bidangkuasanya terhad tidak boleh diperbesarkan oleh sebarang jenis estoppel.
- b*
- c* [5] Estoppel *in pais*, dari segi undang-undang, wujud apabila seseorang melalui tindakannya atau perkataannya membuat satu representasi fakta yang jelas samada dengan pengetahuan mengenai kepalsuannya atau dengan niat bahawa ianya akan memberi kesan dan satu pihak yang lain telah bertindak berdasarkan representasi tersebut dan dengan itu memprejudiskan keadaannya. Disini persoalan samada tindakan dibuat berdasarkan representasi tersebut memprejudiskan sesuatu pihak tidak timbul.
- d* **Oleh Mohamed Dzaidin HMP & Haidar Mohd Noor HMR (majoriti)**
- e* [1] Otoriti undang-undang untuk memutuskan samada kebenaran diperlukan atau tidak dibawah s. 68(a) Akta Mahkamah Kehakiman 1964 adalah keputusan Mahkamah Rayuan dan keputusan tersebut adalah muktamad dan tidak boleh dirayu. Jika tidak, prinsip “saringan” akan gagal.
- f* [2] Dalam rayuan semasa, permohonan ini didasarkan pada penghakiman Mahkamah Rayuan sementara menunggu rayuan dibuat ke atas permohonan responden untuk membatalkan notis rayuan pemohon untuk mendapat kebenaran sebagaimana yang diperlukan dibawah s. 68 Akta Mahkamah Kehakiman 1964.
- g* [3] Dibawah s. 96(a) Akta Mahkamah Kehakiman 1964, penghakiman atau perintah Mahkamah Rayuan yang boleh dirayu ke Mahkamah Persekutuan mestilah berhubung dengan halperkara yang diputuskan oleh Mahkamah Tinggi pada merit dan bukan berhubung dengan penghakiman interlokutori atau perintah yang diputuskan oleh Mahkamah Rayuan setelah mendengar permohonan yang dibuat kepadanya sementara menunggu rayuan.
- h* [4] Pada pembatalan rayuan pemohon di Mahkamah Rayuan, hak-hak pemohon tidak dihabiskan atau di ketepikan mahupun diperjudiskan dalam mana-mana cara. Pemohon seharusnya menggunapakai k. 16 Kaedah-kaedah Mahkamah Rayuan 1994 untuk perlanjutan masa untuk memohon kebenaran.
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[5] Dengan memfailkan permohonan ini, pemohon mencuba untuk mengelak dari k. 16 dan ini adalah satu penyalahgunaan proses mahkamah jika semua remedi yang sedia ada dibawah undang-undang tidak terdahulunya dihabiskan. a

[Usul pemohon ditolak dengan kos untuk responden.] b

Case(s) referred to:

Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors [1995] 3 CLJ 485 (foll)

Dutton v. Sneyd Bycars Co Ltd [1920] 1 KB 414 (refd)

Ex p Stevenson [1892] 1 QB 609 (refd)

Farquharson v. Morgan [1894] 1 QB 552 (refd) c

Foster v. Usherwood 47 LJQB 30 (refd)

In Re Poh [1983] 1 All ER 287 (refd)

Kemper Insurance v. Minister of Finance & Ors [1998] 3 WLR 630 (refd)

Lane v. Esdaile [1891] AC 210 (refd)

O' Reilly v. Mackman [1983] 2 AC 237 (refd)

Podbery v. Peak [1981] 1 All ER 699 (refd) d

Rickards v. Rickards [1989] 3 All ER 913 (refd)

Tolaram Relumal & Anor v. State of Bombay AIR [1954] 496 (refd)

Trustees, Executors and Agency Co Ltd v. Reily [1941] VLR 110 (refd)

Legislation referred to:

Courts of Judicature Act 1964, ss. 44, 67, 68(1)(a), 96(a), 97

Courts of Judicature (Amendment) Act 1994, ss. 45, 46, 47, 48, 49 e

Interpretation Acts 1948 & 1967, s. 17A

Rules of the Court of Appeal 1994, r. 16

Bombay Rents, Hotel and Lodging House Rates (Control) Act 1947 [India], s. 18(1)

For the applicant - Dr CV Das (R Abraham & Sunita Sothi with him); M/s Brockett & Cho f

For the respondent - M Pathmanathan (Gan Techiong with him); M/s Gan & Lim

[Appeal from Court of Appeal; Civil Appeal No: J-02-29-98]

Reported by Yow Ting Fong g

JUDGMENT

Chong Siew Fai CJ (Sabah & Sarawak):

Introduction h

By a motion dated 24 June 1998 the applicant applied for leave to appeal to the Federal Court against the decision of the Court of Appeal made on 28 May 1998 striking out the appeal of the applicant to the Court of Appeal against the decision of the High Court dated 29 December 1997 on the ground that leave to appeal which, according to the Court of Appeal, was necessary but was not obtained. i

- a* The matter was heard before us on 29 March 2000 and 13 April 2000, and the motion was dismissed with costs on a preliminary objection raised by the respondent. It was a majority decision. I had the misfortune of dissenting. We indicated that the grounds of our decisions would be given in due course. I now give my reasons.

b ***The Preliminary Objections***

At the commencement of the hearing of the motion, counsel for the respondent raised three preliminary objections and submitted that by reason thereof the motion ought to be dismissed. The three preliminary objections

- c* are:
- (1) that the Federal Court had no jurisdiction to hear the motion. (For the basis of this contention, see the latter part of this judgment under the heading “Preliminary Objection (1)”);
 - d* (2) that by reason of Counsel for the applicant orally applying on its behalf before the Court of Appeal for leave to appeal, the applicant was estopped from contending before us that leave to appeal was not necessary; and
 - (3) that there had been a failure to comply with rule 107(2) of the Rules of the Federal Court 1995 in that the application did not state whether the intended appeal was against the whole or only a part of the judgment or order, and, if only a part, which part of the judgment or order, and the grounds therefor. This ground, however, was only faintly pursued. In any event, I was of the view that the non-compliance would not vitiate the motion. Effectively, this ground (3) would be thus disposed of.

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f ***Background Facts***

- Before coming to preliminary objections (1) and (2), it would be useful to state briefly the relevant facts and circumstances leading to the motion before us. Pursuant to a sale and purchase agreement dated 28 July 1967 and entered between the parties herein, the applicant agreed to sell to the respondent 26 pieces of land for a total price of S\$52,000 which had been paid in full. Disputes arose resulting in the respondent bringing this suit claiming, *inter alia*, for the transfer to itself the 26 parcels of land and certain consequential orders. On 14 January 1980 the respondent obtained judgment in default of appearance. Pursuant to the default judgment, the senior assistant registrar of the High Court executed the transfers of the 26 pieces of land in favour of the respondent. Since the land titles were not available, the land collector issued fresh land titles. But, for some unknown reason, only 25 titles were issued instead of 26.
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- i* On 10 May 1985, the Federal Court, on appeal by the applicant, set aside the default judgment and remitted the case back to the High Court for trial. However, the transfer of the 25 pieces of land to the respondent which had already been effected remained intact.

Parties then amended their pleadings upon which trial before the High Court proceeded and resulted in the learned trial judge granting the respondent, *inter alia*, the following claims on 29 December 1997:

- (a) a declaration that the 25 fresh land titles issued to the respondent were valid;
- (b) that the registrar of titles was to indorse the respondent as the registered proprietor on the 25 titles;
- (c) that the applicant was to deliver to the respondent the land title relating to the 26th piece of land;
- (d) that the applicant was to transfer the 26th piece of land to the respondent;
- (e) assessment of damages for the delay on the part of the respondent;
- (f) costs.

By a notice of appeal dated 7 January 1998, the applicant appealed to the Court of Appeal. On the respondent's motion dated 16 April 1998, the Court of Appeal on 28 May 1998 struck out the applicant's notice of appeal dated 7 January 1998.

Judgment Of The Court Of Appeal

In its judgment, the Court of Appeal referred to s. 68(1) of the Courts of Judicature Act 1964. On the assumed basis of its being "undisputed" (which the applicant in fact disputed) that the subject-matter being the sale and purchase agreement for the sale of the 26 pieces of land with the contract price below RM250,000, the Court of Appeal was of the view that leave to appeal was necessary and that since such leave was not first obtained, the appeal was incompetent and the notice of appeal was struck out. The Court of Appeal did not consider it making any difference to the fate of the Notice of Appeal even if the subject-matter of the claim were the 26 issue documents of title since they related to the 26 pieces of land that were referred to in the sale and purchase agreement which stipulated the total price of S\$52,000 ie, below RM250,000.

Against the decision of the Court of Appeal on 28 May 1998, the applicant applied to this court for leave to appeal.

Preliminary Objection (1)

For the respondent, it was contended that the Federal Court had no jurisdiction to entertain this motion of the applicant dated 24 June 1998 for leave to appeal against the decision of the Court of Appeal made on 28 May 1998 striking out the applicant's appeal. The basis for this argument was that the Court of Appeal had the sole discretion to determine:

- a* (i) whether or not leave to appeal to itself was required; and
- (ii) if leave to appeal was required, whether or not to grant leave to appeal to itself;
- b* and that the decisions of the Court of Appeal on matters (i) and (ii) above were final and non-appealable. *Auto Dunia Sdn. Bhd. v. Wong Sai Fatt & Ors* [1995] 3 CLJ 485 FC was cited in support.
- c* For the applicant, counsel, while conceding that a decision of the Court of Appeal granting or refusing leave to appeal to itself was non-appealable, contended that the situation in the present case was different. Here, the applicant argued, the Court of Appeal struck out the appeal on the basis (which the applicant disputed) that leave to appeal to the Court of Appeal was required. *Rickards v. Rickards* [1989] 3 All ER 913 CA was cited to illustrate that despite *Lane v. Esdaile* [1891] AC 210 HL from which the extended principle could be derived that where the law provided that an
- d* appeal was to lie by leave of a particular court or courts, the grant or refusal of leave was an non-appealable decision, the Court of Appeal had jurisdiction (subject to the requirements of leave to appeal) to hear an appeal from a county court judge's refusal to extend time for appealing to the judge from an order of the registrar, departing from *Podbery v. Peak*
- e* [1981] 1 All ER 699 CA.
- f* *Auto Dunia, supra* decided that on an application to the Court of Appeal for leave to appeal to the Court of Appeal against a decision of the High Court, the decision of the Court of Appeal refusing leave (or, for that matter, granting leave) to appeal to itself was NOT a judgment or order within s. 96(a) of the Courts of Judicature Act 1964 and therefore not appealable to the Federal Court. The Federal Court accordingly had no jurisdiction to entertain an application for leave against such a grant or refusal by the Court of Appeal.
- g* In my view, *Auto Dunia, supra*, is distinguishable from our present case. In *Auto Dunia, supra*, it was **not disputed** that leave to appeal to the Court of Appeal was necessary. Hence, what the Court of Appeal had to decide was whether to grant or to refuse leave. In our present case, whether leave to appeal to the Court of Appeal is necessary is **in dispute**. The applicant
- h* took the stand that no leave to appeal was needed and hence did not apply for leave. On the other hand, the respondent maintained that leave to appeal was necessary and must be first applied for and obtained. In the result, the Court of Appeal agreed with the respondent and ordered the applicant's notice of appeal to be struck out. In ordering the striking out, upon the
- i* mind of the Court of Appeal was that leave to appeal was necessary and that since it was not first obtained, the appeal was incompetent and must

be struck out. It was upon the above consideration that the appeal was struck out. If (which I am not deciding here) the Court of Appeal happened to be wrong in its view that leave to appeal was required, then the striking out of the notice of appeal would have been unjustified. The state of affairs are significantly different from the “Auto Dunia” situation where it was **common ground** that leave to appeal was an essential element and the issue for the Court of Appeal was whether, on the facts and circumstances of the case, to grant or not to grant. The distinction may be fine but nevertheless important and subtle. Where it is beyond all question that leave to appeal is necessary, the decision of the Court of Appeal in exercising its discretion to grant or to refuse leave is not appealable. But where the requirement of leave to appeal is in dispute, the Court of Appeal which hears the appeal strikes out or dismisses the appeal on the view that it takes that leave to appeal is necessary but not obtained. That decision of striking out or dismissal would, in any view, be appealable, for the issue here is not whether to grant or refuse leave to appeal (which would be non-appealable), but rather whether the deciding court is right in holding that leave to appeal is necessary.

Section 96(a) Of The Courts Of Judicature Act 1964

So far as is relevant for our purpose, s. 96(a) of the Courts of Judicature Act 1964 provides:

Subject to any ... rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court.

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction ...

Relying on the above quoted provisions of s. 96(a), counsel for the respondent submitted to the effect that the decision of the Court of Appeal striking out the applicant’s notice of appeal for want of leave to appeal to the Federal Court was not a judgment or order in respect of a civil cause or matter decided by the High Court in the exercise of its original jurisdiction, and therefore not appealable.

I am unable to agree with the contention. There can, of course, be no dispute that the decision of the Court of Appeal on 28 May 1998 striking out the applicant’s notice of appeal for want of leave to appeal is a judgment or order of the Court of Appeal. Neither can there be any dispute that the decision of the learned trial judge on 29 December 1997 granting the relief sought by the respondent constituted a “civil cause or matter

- a* decided by the High Court in the exercise of its original jurisdiction". The question is: Can the "striking out" decision of the Court of Appeal on 28 May 1998 be said to be "in respect of" a "civil cause or matter decided by the High Court in the exercise of its original jurisdiction". This, in my view, hinges on the construction of the words "in respect of" in s. 96(a) of the Courts of Judicature Act 1964.
- b*

For the applicant, Dr. Das relied on various cases for the interpretation of the words "in respect of". I would refer to only one of them. In *Tolaram Relumal & Anor v. State of Bombay* AIR [1954] SC 496, s. 18(1) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947) called for consideration. The said s. 18(1) provided:

- c*
- If any landlord either by himself or through any person ... receives any fine, premium ... in respect of the grant, renewal or continuance of a lease of any premises ... such landlord or person shall be punished ...
- d* One of the issues was that even assuming the accused had accepted a sum of Rs 2400, could the receipt of that sum be held, in law, to be a premium in respect of the grant of a lease? Delivering the judgment of the court, Mahajan CJ made the following observation on the expression "in respect of". (p. 498 left col.):
- e* "In respect of" means in its plain meaning "connected with or attributable to", and therefore it is not necessary that there must be a simultaneous receipt by the landlord with the grant of the lease. So long as 'some connection' is established between the grant of the lease and the receipt of the premium by the landlord, the provisions of the section would be satisfied.
- f* In the Australian case of *Trustees, Executors and Agency Co. Ltd. v. Reilly* [1941] VLR 110 (facts therein are not relevant for our purpose) Mann CJ explained the words "in respect of" thus (at p. 111):
- The words "in respect" are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer.
- g*

To my mind the explanations of Mann CJ and Mahajan CJ in the above two cases aptly describe the ordinary meaning of the words "in respect of". Guided by the explanations, the words "in respect of" in s. 96(a) of the Courts of Judicature Act 1964 means, in my view, that there must be some connection or relation between the judgment or order of the Court of Appeal and the civil cause or matter decided by the High Court in the exercise of its original jurisdiction. Applying the above construction of the three words to the case presently under appeal, the question is: Is there a connection or relation between the order of the Court of Appeal striking

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out the applicant's notice of appeal on the basis (which the applicant disputed) that leave to appeal was necessary but not obtained **and** the High Court's decision granting the relief sought in the action arising out of which the present appeal before us was brought. The High Court's decision is in respect of a "civil cause decided by the High Court in the exercise of its original jurisdiction." Hence, in my view, there clearly is an undisputable connection or relation between the said order of the Court of Appeal and the decision of the trial judge in the High Court.

It follows that s. 96(a) of the Courts of Judicature Act 1964 is applicable in that the decision of the Court of Appeal made on 28 May 1998 striking out the applicant's notice of appeal is appealable subject, of course, to leave of the Federal Court being granted.

In so deciding, I, of course, have not lost sight of *Auto Dunia, supra*, which I have earlier sought to distinguish.

Estoppel

For the respondent, it was further argued that the applicant, having orally applied for leave to appeal in the course of the hearing before the Court of Appeal, was estopped from contending that leave to appeal was not necessary. I am unable to accept this argument. The point in issue relates to the jurisdiction of the Court of Appeal ie, whether the Court of Appeal had jurisdiction to strike out the notice of appeal when the disputes seriously in contest were whether s. 68(1)(a) of the Courts of Judicature Act 1964 was applicable so that leave of the Court of Appeal was necessary for the appeal, and whether the principle laid down in *Auto Dunia, supra*, applied. In law, where an objection to the jurisdiction of a lower court appears on the face of the proceedings, a party who consented to the exercise of the jurisdiction is not thereby estopped from subsequently raising the objection. *Farquharson v. Morgan* [1894] QB 552 CA. This is because the jurisdiction of a court of limited jurisdiction cannot be enlarged by any form of estoppel.

In *Dutton v. Sneyd Bycars Co. Ltd.* [1920] 1 KB 414 CA, the applicant, a workman, contracted certain disease whilst in the respondent's employment. Prior to suing for compensation on account of the disease suffered, he had received some payments from the respondent company and had signed certain form. It was admitted that the disease the applicant suffered was not a disease mentioned in the relevant Schedule to the Workman's Compensation Act 1906, or in the orders extending the operation of that Schedule. For the applicant, it was contended that the respondent was estopped, by its conduct, from denying that the case came within the said

- a* Act. The county court judge held that the estoppel was established and awarded the applicant compensation. The respondent appealed to the Court of Appeal. In allowing the appeal, Warrington LJ observed: (419-420)

- b* The operation of the Act is confined to a certain class of cases, and it seems to me that the parties cannot by any form of estoppel or by agreement so enlarge the operation of the Act as to bring within it other cases, or to extend the limited statutory jurisdiction to those cases.

- c* In *Foster v. Usherwood* 47 LJQB 30 the registrar, upon an application by the defendant to have the case tried in a county court under certain provisions of the law (the provisions are of no relevance for our purpose) and with the plaintiff consenting to the application, made an order for the action to be tried in the county court. Subsequently, however, he came to the conclusion that the relevant law gave him no jurisdiction to make the order, and he rescinded it. Eventually, the defendant appealed to the Court of Appeal where it was argued on his behalf that the parties had waived the objection. In his judgment, Bramwell LJ said:

- d* I do not understand what is meant by an agreement that the registrar shall have jurisdiction. Where he has not, the parties cannot give it to him ...

- e* I am of opinion that this objection of want of jurisdiction is one which cannot be waived, and the parties cannot give jurisdiction by dispensing with something which is necessary to create it.

- f* Estoppel *in pais*, as a matter of law, arises when a person by his conduct or words makes a clear representation of fact either with knowledge of its falsehood or with the intention that it should be acted upon, and the other person has acted upon such representation and thereby altered his position to his prejudice. In our instant case, the Court of Appeal had expressed its view that leave to appeal was necessary. It was then that the applicant in deference to the view of the Court of Appeal and, perhaps, to save time and expenses of having to make a formal application that it applied orally for leave. In any event, it was not granted by the Court of Appeal. The question of acting upon the representation to the prejudice of a party does not arise.

- g* For the above reasons, I was of the view that the preliminary objection of the respondent failed. I would proceed to hear the applicant's motion for leave to appeal.

Mohamed Dzaidin FCJ:

- i* This was an application for leave to appeal to this court under s. 96(a) of the Courts of Judicature Act 1964 (the Act) from the decision of the Court of Appeal given on 28 May 1998 and for ancillary orders.

At the outset of the proceedings, Encik Pathmanathan, counsel for the respondent, raised a preliminary objection contending that the application is misconceived because it is founded on the decision of the Court of Appeal under s. 68(1)(a) of the Act and not from its judgment or order in respect of a civil cause or matter decided by the High Court in the exercise of its original jurisdiction within the meaning of s. 96(a) of the Act. Hence, the motion should be struck out.

After hearing counsel, by a majority decision (Chong Siew Fai, HBSS, dissented), we upheld the objection and struck out the motion with costs to the respondent. Our reason are these.

Background

On 7 January 1998 the applicant filed a notice of appeal in the Court of Appeal against the decision of the High Court Johor Bahru in Guaman Sivil No. 22-254-1979. On 18 February 1998, the applicant duly filed the appeal record.

On 16 April 1998 the respondent filed a motion to dismiss the appeal on the ground that no leave was obtained from the Court of Appeal pursuant to s. 68(1) of the Act. Subsequently, on 7 and 8 May 1998 respectively, the applicant filed two other applications for leave to file a supplementary appeal record and for stay of execution of the High Court order.

On 28 May 1998, the Court of Appeal heard the three motions. With respect to the respondent's application to strike out the applicant's notice of appeal, it was the submission of counsel that leave was necessary under s. 68(1)(a) because the subject-matter of the appeal was less than RM250,000, based on the value stated in the sale and purchase agreement purportedly entered into between the applicant as vendor and respondent as purchaser. The relevant paragraph of s. 68(1) reads as follows:

68. Non-appealable matters

(1) No appeal shall be brought to the Court of Appeal in any of the following cases:

- (a) when the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit, except with the leave of the Court of Appeal;

The Court of Appeal accepted the above submission. In its seven page judgment, the court held as follows:

a It is undisputed that the value of the subject-matter in this case which was the value of the contract price was below RM250,000 and we are of the view that it falls squarely within the requirement of section 68(1)(a) of the Act in that leave must first be obtained before an appeal can be filed ...

b Learned counsel for the Applicant/Appellant also urged us that the damages prayed for in Prayer (vi) in the Statement of Claim should be added to the value of the subject-matter so that the total value would be unknown; thus it would pass the test laid down in section 68(1)(a) of the Act and therefore leave would not be required. We however were unable to accept such a proposition for the reason that section 68(1)(a) of the Act clearly specifies that the 'value' that is required to be quantified must be the 'value' of the subject-matter 'of the claim'. The damages as prayed in Prayer (vi) are only consequential. They are not the 'subject-matter of the claim'.

c In view of its decision to strike out the notice of appeal, the other two motions were accordingly dismissed by the Court of Appeal with no order as to costs.

d ***Arguments On The Preliminary Objection***

The crucial question here is whether the decision of the Court of Appeal, upon a motion by the respondent, striking out the applicant's notice of appeal is appealable to the Federal Court under s. 96(a) of the Act.

e The material part of s. 96(a) states:

f Subject to ... any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court ...

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction ..

g The thrust of Encik Pathmanathan's submission is that the present application originated from the Court of Appeal against its decision upon a motion by the respondent to strike out the applicant's notice of appeal to the Court of Appeal on the ground that the notice was filed without leave contrary to s. 68(1)(a) of the Act. The decision is not in respect of a civil cause or matter decided by the High Court. But, it is a decision based on a motion to strike out the notice of appeal filed in the Court of Appeal. Therefore, a decision of the Court of Appeal that the applicant's notice of appeal required leave under s. 68(1)(a) is not a judgment or order within the meaning of s. 96(a) of the Act.

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Counsel relied solely on *Auto Dunia Sdn. Bhd. v. Wong Sai Fatt & Ors* [1995] 3 CLJ 485 which held that refusal of leave to appeal by the Court of Appeal was not a judgment or order within the meaning of s. 96(a) of the Act.

Dr. Das, for the applicant, in his reply (see his written outline of submission) submitted that it would seem that the Court of Appeal could not decide anything on a cause or matter unless there was an appeal pending or an intended appeal before it. It did not have any original jurisdiction like the High Court, eg, to grant an injunction, or to issue *certiorari*, declaration or *mandamus* or to make declarations of rights. However, if there was a pending appeal, by s. 44 the Court of Appeal could make adjunctive orders in relation to the appeal to facilitate the appeal eg, a stay, to order security, or to enlarge time, or to allow further evidence etc. In addition, it could also deal with other matters relating to the appeal eg, that the appeal is incompetent because leave was not obtained or that the notice of appeal was filed out of time or that the appeal record was filed out of time etc. These are not orders made by the Court of Appeal from a decision of the High Court, but in a sense, they are made for the first time in the Court of Appeal. Relying on his submission that the phrases “**any judgment or order**” and “**in respect of**” are words of the wide amplitude, counsel contended that they are nevertheless orders made **in respect** of an appeal from a decision made by the High Court for it is the appeal from the High Court that vests the Court of Appeal with jurisdiction to make orders. Thus, on a plain reading of s. 96(a), the phrase “**any judgment or order of the Court of Appeal**” would give the Federal Court jurisdiction to receive an appeal from a decision of the Court of Appeal.

Dr. Das’s second point is on the decision of the Federal Court in *Auto Dunia*, where it was held, per Edgar Joseph Jr, FCJ, that the exercise of a discretion to grant or refuse leave to appeal is not judgment or order within the meaning of s. 96(a) of the Act. According to counsel, the case was decided purely on policy considerations addressed by the House of Lords in *Lane v. Esdaile* [1891] AC 210 with respect to leave requirements, namely, that the objective of limiting appeals by requiring leave would be defeated if there could be an appeal against the grant or refusal of leave itself. Counsel referred us to the recent decisions of the English Court of Appeal in *Rickards v. Rickards* [1989] 3 All ER 193 which refused to apply *Lane v. Esdaile* and *Kemper Insurance v. Minister of Finance & Ors* [1998] 3 WLR 630, a Privy Council decision distinguishing *Lane v. Esdaile*. He urged us to follow *Rickards v. Rickards* and confine *Auto Dunia* only to an order granting or refusing leave and not to cover a decision by the Court of Appeal striking out a notice of appeal under s. 68(1)(a) of the Act for want of leave.

- a* It is trite that the Court of Appeal today no longer has any original jurisdiction after the repeal of ss. 45-49 of the Act by the Courts of Judicature (Amendment) Act 1994 (Act A886). What remains is its criminal and civil appellate jurisdiction. Section 67 gives the Court of Appeal jurisdiction to hear and determine civil appeals from judgments or orders of the High Court. Section 68 deals with non-appealable matters to the Court of Appeal. We agree with counsel that under s. 44 of the Act, a judge of the Court of Appeal can give incidental directions and make interim orders in any proceeding pending before it which do not involve the decision of the proceeding. Quite clearly, this jurisdiction is conferred on the Court of Appeal to prevent any prejudice to the claims of the respective parties pending the hearing of the proceeding. In our view, the key words in s. 44 are **“not involving the decision of the proceeding.”**

- d* We also agree that the Court of Appeal can deal with other matters relating to or in pending appeal, eg, whether the appeal is incompetent because leave was not obtained or whether in a given situation leave was necessary, or that the notice of appeal was filed out of time or the appeal record was not filed in time, etc. The parties can apply to the court, which unless otherwise provided are made by motion and heard in open court. See Part III Rules of the Court of Appeal 1994. It is clear to us that the decision of the Court of Appeal on those matters are decisions or orders made for the first time in the Court of Appeal. Dr. Das contended that although they are **in a sense** (emphasis added) made for the first time in the Court of Appeal, nevertheless they are orders or decisions made **in respect** of an appeal from the decisions made by the High Court under s. 96(a) of the Act.

- f* If the submission of Dr. Das that whether leave is required or not are orders or decisions made **in respect** of an appeal from the judgment or order made by the High Court under s. 96(a) of the Act is correct, it follows that the granting or refusal of leave are also orders or decisions made **in respect** of judgment or order made by the High Court, then *Auto Dunia* was wrongly decided. With respect, we disagree.

- g* It would seem clear to us that the legal authority to decide whether leave is required or not under s. 68(a) of the Act is the Court of Appeal and therefore it follows that the decision of the Court of Appeal is final. To hold otherwise would lead to absurdity and defeat the “filter” principle unless an appeal from it is expressly given.

- h* In our view, there are two parts to s. 68(a) of the Act. Firstly, whether the subject matter requires leave and secondly, if leave is required, whether it should be granted or refused. *Auto Dunia* decided that the order granting

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or refusing leave to appeal is final and not appealable. By analogy, the decision of the Court of Appeal whether leave is required or not should also similarly be final and not appealable.

In our view, such an interpretation would be in accord with the purpose or object of the legislature as provided by s. 17A of the Interpretation Acts 1948 and 1967 (Act 388) which reads:

17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

The purpose or object is the “filter” principle as decided by *Auto Dunia* in which the same principle should be applied in the matter before us.

So a question that arises is whether the instant application for leave to appeal is from the judgment or order of the Court of Appeal in respect of a civil cause or matter decided by the High Court. Clearly, the application is founded on the judgment of the Court of Appeal in a pending appeal made on an application by the respondent to strike out the applicant’s notice of appeal on the ground that it was filed without leave of the Court of Appeal as required by s. 68(1)(a) of the Act. In short, the instant application is not against the judgment of the Court of Appeal in respect of a civil cause or matter decided by the High Court on the merits.

It is to be noted that Parliament has thought fit to impose conditions in respect of right of appeal from the Court of Appeal to the Federal Court under s. 96(a) of the Act. The conditions are that leave of the Federal Court must be obtained and the matters that are appealable are from any judgment or order of the Court of Appeal in respect of any cause or matter decided by the High Court in the exercise of its original jurisdiction. On the true construction of s. 96(a), we form the view that the judgment or order of the Court of Appeal to appeal from must be in respect of a cause or matter decided by the High Court on the merits and not in respect of interlocutory judgment or order decided by the Court of Appeal upon the hearing of an application made to it in a pending appeal before it. Unless there is an express provision that an appeal shall lie from the Court of Appeal to this court from its interlocutory judgment or order in respect of a matter pending appeal before it, by necessary intendment of s. 96(a) the interlocutory judgment or order of the Court of Appeal is not appealable and does not come within the meaning of s. 96(a) of the Act.

- a* We were urged by Encik Pathma that we should follow *Auto Dunia* which adopted the policy considerations in *Lane v. Esdaile*. Dr. Das however cautioned us that in the U.K, *Lane v. Esdaile* principle which applied to cases where leave provisions are involved has not been extended to a decision involving refusing to extend time to appeal (*Rickards v. Rickards*)
- b* and to judicial review leave cases (*Kemper Insurance*).

- In *Auto Dunia* the defendant made an application to the Federal Court for leave to appeal against the decision of the Court of Appeal refusing to grant him leave to appeal under s. 68(1)(a) of the Act from the decision of the High Court Ipoh. The question which arose upon the preliminary
- c* objection was whether the refusal of leave by the Court of Appeal was “a judgment or order” within the meaning of s. 96(a) of the Act. Having regard to the circumstances of the case and the language of the relevant statutory provisions viz. ss. 67, 68(1)(a), 96(a) and 97 of the Act the Federal Court held it was not. Edgar Joseph Jr. FCJ, in his judgment relied
- d* on the judgment of Lord Halsbury LC in *Lane v. Esdaile*. His Lordship also followed *ex p Stevenson* [1892] 1 QB 609 and *In Re Poh* [1983] 1 All ER 287 HL which applied the ratio in *Lane v. Esdaile*. In short, *Auto Dunia* applied the principles enunciated therein. Thus, the true ratio of the House of Lords’ decision is that where it is provided that an appeal shall
- e* lie by leave of a particular court or courts, neither the grant or the refusal of such leave is itself appealable, otherwise the introduction of the ‘filter’ requiring leave would be pointless (per Lord Donaldson MR in *Rickards v. Rickards* (*supra*) at pp. 197, 201). In the result, there is no reason why this court should disagree with the reasons and conclusion stated in *Auto Dunia*.
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- We agree with Dr. Das that *Lane v. Esdaile* principle has not been applied to applications for an extension of time for appealing (*Rickards v. Rickards*) and to applications for leave to apply for judicial review (*Kemper Insurance*). In fact, it has been applied in numerous cases as binding
- g* authority for the more limited proposition regarding power of a legal authority to grant or refuse leave to appeal. Nevertheless, it was decided on the basis of policy consideration with respect to leave, for if the grant or refusal of leave is itself appealable, “the introduction of the ‘filter’ requiring leave would be pointless” (*Rickards v. Rickards*, *supra*).

- h* In *Kemper Insurance*, the case of *O’Reilly v. Mackman* [1983] 2 AC 237 was referred to, in which Lord Diplock, at p. 280 stated that the purpose of the leave requirement was to protect the public administration against false, frivolous or tardy challenges to official action. This policy has something in common with the policy of requiring leave to appeal, namely
- i* to act as a filter against frivolous or unmeritorious proceedings.

In our view, based on the above statement of principles and in the context of s. 96(a) of the Act, it is laudable, as a matter of policy, to restrict the right of appeal from the Court of Appeal to the Federal Court with leave only to cases where the judgment or order of the Court of Appeal is in respect of any civil cause or matter decided by the High Court on the merits. If a decision of the Court of Appeal made on a motion in a pending appeal is appealable, then the result would be that there would be two appeals in every case “in which, following the ordinary course of things, there would only be one.” Hence, the policy of requiring leave to appeal under s. 96(a) to act as a “filter” against unnecessary appeals would be defeated.

In support of the above view, we rely on the reasonings of Lord Esher MR in *Ex p Stevenson* who with great clarity analysed *Lane v. Esdaile*. At p. 611, the learned Master of the Rolls stated:

I am, on principle and on consideration of the authorities that have been cited, prepared to lay down the proposition that, wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given. So, if the decision in this case is to be taken to be that of the judge at chambers, he is the legal authority to decide the matter, and his decision is final; *if it is to be taken to be that of the High Court, then they are the legal authority entrusted with the responsibility of deciding whether there shall be leave to appeal, and their decision is final*. In either case there is no appeal to this court. What was said in the case of *Lane v. Esdaile* supports the view that I am taking. But the very nature of the thing really concludes the question; for, if, where a legal authority has power to decide whether leave to appeal shall be given or refused, there can be an appeal from that decision, the result is an absurdity, and the provision is made of no effect. If the contention for the claimant is correct, it would follow that the case might be taken from one court to another till it reached the House of Lords on the question whether there should be leave to appeal. (emphasis added).

Before concluding we would like to make one observation in respect of the application before us. It is this.

The step taken by the applicant in this application is misconceived. We say so because though the Court of Appeal struck out the notice of appeal, the applicant’s rights are not exhausted or shut out or for that matter in any way prejudiced. During the course of the hearing, it was brought to the attention of Dr. Das of the provision of r. 16 of the Rules of the Court of Appeal 1994. Rule 16 reads:

- a* Where leave of the Court of Appeal is required, the application for such leave may be made to the Court before expiration of the time limited for bringing the appeal or **within such enlarged time as the Court may allow.**

The applicant chose not to resort to r. 16 but instead filed the present application purportedly under s. 96(a) of the Act.

- b* In reply, Dr. Das submitted that the Court of Appeal, in its written judgment in response to the oral application of counsel for the applicant that he be allowed to file a motion for leave remarked, "We thought it was too late in the day for the request to be entertained" Dr. Das therefore
- c* contended that it was pointless for the applicant to urge the Court of Appeal to invoke its powers under r. 16. However, a look at the order of the Court of Appeal would show that there was no express order refusing the request to file a motion under r. 16. In the event, the remarks of the Court of Appeal should be treated as *obiter*.

- d* In our view, it was still open to the applicant to file a motion setting out the grounds in support thereof under r. 16. Whether the applicant will succeed or not is a different issue altogether. However, Dr. Das further contended that if the applicant were to proceed under r. 16 and its application is refused by the Court of Appeal, the applicant would be
- e* caught by *Auto Dunia*. With due respect, by filing the present application, the applicant in effect was attempting to circumvent r. 16 by coming straight for leave to the Federal Court. In our view, this is an abuse of the process of the court. The applicant must and should first exhaust all remedies available under the law.

f **Conclusion**

In our judgment, for reasons stated and as a matter of policy, the ratio in *Lane v. Esdaile*, followed in *Auto Dunia* applies to cover a decision or order of the Court of Appeal like the instant application.

- g* Last but by no means least, I have shown this grounds of judgment in draft to my learned brother Haidar HMR, who agreed with it.

Accordingly, the preliminary objection was upheld and the applicant's application for leave under s. 96(a) of the Act was dismissed with costs.

- h* Deposit to the respondent to account of its taxed costs.

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